IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 14143-1

CHARLES H. COX, J. L. COX, CLAUDE G. COX, and JAMES H. COX,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Defendants.

Before: Floyd R. Gibson, Circuit Judge, William H. Becker, Chief District Judge, and John W. Oliver, District Judge.

Memorandum and Order.

This case pends on the Government's motion for summary judgment. Jurisdiction in this three-judge court is invoked pursuant to the provisions of Sections 2284 and 2321, et seq., of Title 28, United States Code.

Plaintiffs, appearing *pro se*, seek review of various orders of the Interstate Commerce Commission in several proceedings in which one or more of these plaintiffs filed applications for motor carrier authority. Certified

copies of all documents and records of the Commission pertaining to these plaintiffs have been filed with the Court, and the parties have stipulated that the Court decide this case on the basis of this stipulated record of the Commission's proceedings.

These plaintiffs have been in legal battle with the Commission over a period of thirty years. It is apparent from reading the record of the Commission's proceedings that most of plaintiffs' troubles stem directly from the fact that they refuse to employ counsel to advise and represent them. As we shall discuss below, it is apparent that plaintiffs have never understood what their obligations under the Interstate Commerce Act were. We have, therefore, attempted to read plaintiffs' pleadings liberally and to review the records of the Commission in that light.

This Court's jurisdiction to review decisions of the Interstate Commerce Commission is limited. The scope of review was correctly stated by the Court in *Studna* v. *United States,* W. D. Mo. 1964, 225 F. Supp. 973 at 981-982: "A three-judge court may not review the evidence *de novo* but must sustain the findings and conclusions of the Commissioner where they are found to be supported by substantial evidence. Unless specific and prejudicial departure from the requirements of the law or abuse of discretion is shown, a reviewing court is without authority to intervene. . . ." The scope of review was discussed in *United Van Lines, Inc.* v. *United States,* E. D. Mo. 1967, 266 F. Supp. 586:

> These arguments go to the issue of whether or not the findings of the ICC are supported by adequate and substantial evidence in the record. "The Commission's findings and order is presumptively valid * * *," *Chicago, Rock Island and Pacific R. R.* v. *United States,* 233 F. Supp. 381 (E. D. Mo. 1964),

at 388, and "(t)he judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body," *Miss. Valley Barge Lines Co.* v. *United States,* 292 U. S. 282, 286, 287, 54 S. Ct. 692, 78 L. Ed. 1260, quoted with approval in *Sloan's Moving & Storage Co.* v. *United States,* 208 F. Supp. 567 (E. D. Mo. 1962), aff'd. 374 U. S. 95, 83 S. Ct. 1687, 10 L. Ed. 2d 1026 (1963). Therefore, if the conclusions of the ICC are supported by substantial evidence in the record, this Court must affirm the decisions made by the ICC and enforce their orders; "(o)rders of the Commission based upon adequate findings and supported by substantial evidence cannot be upset," *Sloan's Moving & Storage Co.* v. *United States, supra; United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U. S. 515, 535, 536, 66 S. Ct. 687, 90 L. Ed. 821 (1946); *Convoy Co.* v. *United States,* 200 F. Supp. 10, 12-13 (D. C. Or. 1961). [266 F. Supp. 588-589]

The applications before this Court sought to establish rights under the 1935 grandfather clause contained in Section 206 (a)(1) of the Motor Carriers Act, 49 USC § 306 (a)(1). That section requires that upon a showing of bona fide operation as a common carrier by motor vehicle as of June 1, 1935, over route or routes or within territories for which application is made and continued operation since that time to the time of the application, an applicant would be entitled to a certificate without proof of public convenience and necessity. The applicant carries the burden of establishing bona fide operation on the statutory date and continuing to the time of the hearing. *Alton Railroad Co.* v. *United States,* 315 U. S. 15 (1942). The test of bona fide operation contemplates an actual rather than potential or simulated service and that such actual service must be substantial. *United States* v. *Carolina Freight Carrier Corp.,* 315 U. S. 475

at 480 (1942). In making its determination on the factual question presented it is the duty of the Commission to consider the characteristics of the transportation service involved and the geographical area served. *Alton, supra; Carolina Carriers, supra; Wintergarden* v. *United States,* E. D. Tenn. 1962, 211 F. Supp. 280.

The 1936 Applications.

In 1936 there were three applications filed, only two of which are before this Court. MC-61924 was filed by Claude G. Cox on February 3, 1936, and MC-51121 was filed by Charles Cox and Jack Sellick on February 12, 1936. The third proceeding, MC 89397, was filed by C. H. Cox and C. G. Cox and involved an application for contract carrier permit. The denial of a permit in connection with MC-89397 on March 18, 1939, is not before this Court.

In both MC-61924 and MC-51121, the Interstate Commerce Commission issued orders to show cause on March 21, 1938, and April 23, 1938, respectively, why the applications should not be dismissed for want of prosecution, there having been an apparent failure to comply with requests to furnish evidence necessary for determination of these applications. No response having been made to those show cause orders, the Commission dismissed MC-61924 on June 9, 1938, and MC-51121 on July 9, 1938, for want of prosecution.

We cannot say that the action of the Commission was either unsupported by the record or arbitrary or capricious. Compare *Peninsula Corp.* v. *United States,* (D. C. 1945) 60 F. Supp. 174.

Plaintiffs attempt in this Court to raise a question concerning the notice that preceded the orders to show

cause and subseqnent dismissal of their 1938 applications. The records of the Commission establish that notice was in fact sent to the plaintiffs at the address shown by the records of the Commission. No evidence was presented which would tend to support any failure to receive the notices or any other irregularity on the part of the Commission.

The 1958 Applications.

In 1958 there were five proceedings before the Commission involving these plaintiffs:

(1) MC-118267, filed by Charles H. Cox on February 10, 1958;

(2) MC-118268, filed by D. E. Cox on December 10, 1958;

(3) MC-118669, filed by J. L. Cox on December 10, 1958;

(4) MC-118670, filed by James H. Cox on December 10, 1958; (The latter party has withdrawn from litigation in this Court); and

(5) MC-61924, (Sub. No. 1), filed by Claude G. Cox, on December 10, 1958.

The applications filed in 1958 sought to establish "grandfather" rights under § 7 of the Motor Carriers Act of 1958, following 49 U.S.C. § 303 (b).

In Case No. MC-118267, application of Charles H. Cox, a hearing to receive grandfather clause evidence under the 1958 Act was held before Examiner Lacy W. Hinely on October 2, 1959, at Kansas City, Missouri. Charles H. Cox appeared for himself. Several protestants appeared by counsel.

Charles Cox attempted to establish his right by the introduction of an insurance policy and a bundle of gasoline and weight receipts. The insurance policy afforded

coverage only for the period of May, 1951, to May, 1952 (Tr. 24). The gasoline receipts were dated 1953 and 1954 (Tr. 42). The record does not indicate that the weight receipts bore any dates at all (Tr. 94).

It is apparent that Charles Cox' efforts to introduce these documents in evidence was frustrated by protestants' constant objections to their relevance and materiality, and by the general confusion created by his apparent inability to understand the nature and extent of his duty with regard to establishing his right to a grandfather's certificate. The transcript of the proceedings before the Commission show that it was indeed difficult for the Hearing Examiner to establish any orderly procedure in the conduct of the proceedings. Charles Cox had brought to the hearing five suitcases full of business documents but he had not made any attempt to organize these documents for presentation in evidence (Tr. 24).

The hearing examiner attempted to aid Charles Cox in the organization of his material and in presentation of his case. He attempted to determine whether Charles Cox had made any abstract or list of shipments transported in 1956, 1957, 1958, and 1959. The answers were all negative (Tr. 46-47). At a later point in the hearing, the examiner was forced to restrict Mr. Cox' evidentiary offers of gasoline slips for the years 1957 to the time of the hearing, absent some showing that applicant had additional documents to indicate transportation for hire of the commodities involved that could be said to be related to the gasoline receipts (Tr. 88). At another point protestants sought to invoke Commission Rule 1.83, which permits a hearing examiner to refuse to receive in evidence other than a number of typical documents and to require the party to abstract the relevant data there-

from (Tr. 55). That motion was overruled, the Hearing Examiner stating that "the rule will be enforced by the Hearing Examiner to the end of giving a fair hearing to everyone and to do it as expeditiously as possible" (Tr. 57).

Late in the day Charles Cox became ill and requested a continuance (Tr. 112). Protestants moved that any further proceedings be consolidated with the similar applications of the other Cox brothers and that certain orders be issued governing procedure of further proceedings (Tr. 115 to 118). The Examiner made clear that he would only continue the hearing and that all motions must be directed to the Commission itself (Tr. 119). The Hearing Examiner also requested that "the applicant do all that is possible to consolidate whatever documents he might have that he desires to present to show transportation or meet the requirements of the Act. . . ." (Tr. 113).

The hearing of Charles Cox was not taken up again until December 8, 1960, at which time it was consolidated with the applications of J. L. Cox, MC-118669; D. E. Cox, MC-118268; Claude G. Cox, MC-61924 (Sub. No. 1); and James H. Cox, MC-118670. The December 8, 1960, hearing was held before another hearing examiner. The morning of the hearing was consumed by the taking of appearances. During that morning various objections were made by the Cox brothers to the appearance of certain protestants and the assertion of the violation of the Cox' alleged constitutional rights. At Tr. 157 the hearing examiner, intent on avoiding the apparent procedural chaos that prevailed in the hearing of October 2, 1959, explained what was necessary for the Coxes to establish their rights. He stated: "When one files for grandfather authority he does not have to prove that there is need for service; he does not have to prove that public convenience and

necessity requires such service; he merely has to show that what his operations have been prior and subsequent to May 1, 1958, and continuous since. The protestants' positions in a grandfather application such as yours are is no more than to see that your operations were actually as you say they were . . . . If you show your operations, you will get your authority; if you don't show your operations, you don't get your authority, it is just that simple. . . . You are not defendants in this case, sir, regardless of the fact that you put it down on your appearance sheet, and that goes to all the Coxes here."

The basis of the Coxes' constitutional objections were that titles of nobility were established and were being exercised by protestants (Tr. 159-160). From Tr. 164 to 178, J. L. Cox was allowed to read a prepared statement into the record dealing with those constitutional ojections. After the noon recess, Charles Cox was allowed to proceed. He sought to serve the Hearing Examiner with a subpoena for all documents pertaining to the various applications of the Cox brothers in the possession of the Interstate Commerce Commission and the complete record of operating authority of Watson Transportation Company and all other parties that made an appearance in these proceedings. The request for the subpoena was denied (Tr. 202).

Charles H. Cox then requested a jury trial (Tr. 203). This was denied. Charles Cox attempted to place J. L. Cox on the stand to testify (Tr. 203). This, too, was denied on the basis that J. L. Cox stated that he was not a witness for Charles H. Cox (Tr. 211). At Tr. 205 the Examiner inquired of Charles H. Cox whether he had made an abstract of the documents that he sought to present for consideration as he had been requested to do by Mr. Hinely in 1959. Mr. Cox stated at Tr. 206 that

in his opinion he was organized. Charles Cox attempted to place into the record a receipt for payment on Permit No. 184625, allowing him to operate on a single trip into and across the State of Nebraska. Objection to this was sustained on the ground that no foundation had been laid (Tr. 214).

At Tr. 218 the Examiner inquired whether Charles Cox had ". . . any documentary evidence of your operations that would begin prior to May 1, 1958, but not prior to January 1, 1957." Charles Cox answered in the affirmative. Thereafter, the Examiner attempted to ascertain the location of those documents. Such documents were never located (Tr. 221).

Charles H. Cox then sought a continuance which was granted until 9:30 the next morning (Tr. 230 and 231).

J. L. Cox took the stand the next morning (Tr. 232) and sought to introduce a certificate of registry of person transporting for hire dated November 14, 1951 (Tr. 234). He also offered a check to the government for transportation tax dated January, 1953 (Tr. 236). The Examiner refused to receive the check in evidence (Tr. 237) and asked the witness to proceed from January 1, 1957. J. L. Cox stated that he did not have documents for 1957 and none later than 1953 (Tr. 239, 242). The case of D. E. Cox, MC-118268, was then called (Tr. 245). He failed to appear.

The Examiner then proceeded to the application of James H. Cox, MC-118670 (Tr. 245). James H. Cox stated that he was born in 1885, with all the rights that were being asked for and demanded that "you people . . . get off my back and give me a certificate so that I can go ahead and work honestly . . . ." The Examiner inquired as to whether the applicant had any supporting

documents and the witness stated that he not going to produce them (Tr. 246).

The hearing was adjourned until 9:30 o'clock the next morning to hear the application of Claude Cox.

On the morning of December 9, 1960, Claude Cox appeared and stated in response to the inquiry of the Examiner that he did not have documents to show operations on and subsequent to May 1, 1958 (Tr. 259). The Examiner inquired whether it was Claude Cox's position that he had been transporting the commodity named in his application from January 1, 1957, until the present time. Claude Cox answered that he did in 1957, but not in 1958, explaining that in 1958 he could not get the stuff. "You couldn't show no authority" (Tr. 260). In response to inquiry about the years 1959 and 1960, Charles Cox stated that "they was afraid that if it was shipped by me they would get themselves in trouble and I would get in trouble."

Claude Cox stated in substance that while he had once shipped the commodities listed in his application that he had discontinued operations in 1957.

The Charles H. Cox hearing was then resumed. He proceeded by adopting the constitutional objections read into the record by J. L. Cox on the previous day. He then stated: "I am physically unable to meet the requirements as set forth by the Court. . . . I have no further statements to make" (Tr. 262). Charles H. Cox stated that he was going to let his application ". . . rest on the record as it is" (Tr. 263). The Examiner then inquired as to whether any of the applicants had anything further, other than adopting certain objections made by the other applicants. They did not (Tr. 263-264). The protestants offered nothing for the record (Tr. 264). The hearings were thus concluded.

On January 5, 1961, Examiner Laughlin recommended dismissal of the application of D. E. Cox, MC-118268. The Examiner stated that the applicant had been called, but had not appeared, that the application did not of itself contain sufficient information to determine bona fide operations, and that the applicant had failed to show any operations performed at a statutory date. A notice signed by Secretary Harold D. McCoy, dated February 6, 1961, from the Interstate Commerce Commission notified the parties that no exceptions having been taken from the recommended order and report with regard to D. E. Cox filed by the Examiner on January 5, 1961, and the period therefore having expired, it became the order of the Commission.

With regard to the applications of Charles H. Cox, J. L. Cox, Claude G. Cox and James H. Cox, exceptions were filed by the applicants on April 10, 1961. Answers were filed by the protestants and applicants' replies on May 9, 1961. On June 27, 1961, the Commission, through Division One, entered its decision and order wherein it adopted the statement of facts, conclusions and findings of the Examiner, it appearing that the exceptions and replies of applicants raised no new or material matters of fact or law. The Commission did not discuss the evidence in light of the exceptions and the replies.

The report of the Examiner adopted by Division One of the Interstate Commerce Commission stated the facts and concluded as follows that "no abstracts or other information were filed by the applicants to show point to point operations."

The Examiner stated in regard to the application of James H. Cox, MC-118670, that no evidence was adduced at the hearing and no documents were presented to sub-

stantiate that he was in bona fide operations during the statutory period.

In regard to the application of Claude G. Cox, MC-61924 (Sub. No. 1), the Examiner stated that, while the applicant claimed he was operating with respect to particular commodities, his operation had ceased in 1957 due to the fact that no one would ship with him absent authority from the Commission. The Examiner further stated that the fact that Claude Cox was unable to obtain shipments was not significant in that it was in the applicant's power to compete for traffic which was moving by other carriers who were in a similar position of holding no authority from the Commission.

In regard to the application of J. L. Cox, MC-118669, the Examiner stated that no documents were offered to show bona fide operations subsequent to 1953, and that, while the applicant claimed he was operating he had stated that he could not get a load. The Examiner stated that the claim of continuous operation on or after May 1, 1958, was not substantiated by any mention of origin or destination and that in any case he would "not be justified in attempting to base a grant of 'grandfather' authority solely on this applicant's uncorroborated testimony of vague and self-serving statements. This is not to cast any doubt about applicant's veracity but only to make it clear that in proceedings of this nature confirmatory evidence is required." The Examiner then stated that in light of this information no finding of bona fide operations could be made.

In regard to the application of Charles H. Cox, MC-118267, the Examiner stated that "substantially no documents were produced to show commodities being shipped, the weights thereof, the consignor or consignee, or the origin and destination. The Examiner further stated that

Charles Cox subsequently admitted that he had no documents to support his application. The Examiner stated that the gasoline and weight slips presented by Charles Cox, dated 1953 and 1954, had no determinative value because they were too remote from the statutory date. The Examiner then stated that Charles Cox had failed to show bona fide operations during the statutory period.

The findings of the Hearing Examiner, as adopted by the Commission, are supported by substantial evidence. We so find.

The record of the Commission was truly devoid of any competent evidence to substantiate plaintiffs' bare claims of bona fide operations. The apparent root cause of this void is plaintiffs' complete lack of understanding of the law and legal processes, though it is impossible to say whether there was in fact any merit to plaintiffs' cause within the statute. Further, it must be stated that under the circumstances the Hearing Examiners attempted in every possible way to assist the plaintiffs in the presentation of their cases.

The contention of the plaintiffs that they could not obtain business because they did not have Commission authority and therefore no one would do business with them raises the question of whether an interruption in service was beyond plaintiffs' control.

It further implies that applicant attempted to obtain loads and was thus holding out his services to the public. Whether the applicant was engaged in bona fide operations continuously since the grandfather date, assuming he was operating on that date except for interruptions in service beyond his control, is a question of fact to be determined by the Commission. *United States* v. *Maher*, 307 U. S. 148 (1939). See also *Melman* v. *United States*, S. D. Iowa 1964, 231 F. Supp. 503, and *Mid-States Freight*

Lines v. *United States* (D. Kan. 1944), 56 F. Supp. 20.

The Hearing Examiner found with respect to Charles H. Cox that the gasoline sales slips and weight station slips showing dates of 1953 and 1954 had no probative value; that said documents failed to show the movement of any of the involved commodities; and that while applicant was requested to obtain documents to show operations from 1957 to date, said request was not complied with. We cannot say that the Examiner's ruling here with regard to the 1953 and 1954 documents was arbitrary. In *Wintergarden, supra,* the court held that once bona fide operations were established as of the statutory date, the evidence of holding out becomes significant for the purposes of determining exactly what the scope of those bona fide operations were. The Examiners held here that the applicants had failed to establish bona fide operations as of the statutory date.

Free of all the chaff created by the plaintiffs' lack of legal assistance, this case simply comes down to plaintiffs' inability to establish what it was clearly their statutory duty to establish after having been given full and fair opportunity to do so before the Commission.

For the above stated reasons, it is

ORDERED that defendants' motion for summary judgment be, and is hereby, granted and the decision of the Interstate Commerce Commission regarding these plaintiffs be, and are hereby, affirmed.

FLOYD R. GIBSON, *Circuit Judge,*
WILLIAM H. BECKER, *Chief Judge,*
JOHN W. OLIVER, *District Judge.*

Kansas City, Missouri,
July 15, 1968.